



Governor Brian Schweitzer

Montana

Department of Labor and Industry

Business Standards Division

Board of Realty Regulation

POSITION STATEMENT OF MONTANA BOARD OF REALTY REGULATION

The Board has adopted the following memorandum of Board Counsel.

Position Statement Regarding Supervision of Property Managers & Application of Realty Regulation Act to Personal Transactions of Licensees

Date: January 29, 2010

ISSUES PRESENTED:

1) Must a supervising broker exercise supervision of a salesperson's property management duties when the salesperson holds both a sales license and a property management license?

and

2) Does a licensee have to follow the Board law & rules if they are managing their own property? If so, may the Board discipline the licensee for activity involving the licensee's own property?

Short Answer: A supervising broker has no supervisory responsibility over a licensee's personal transactions. A supervising broker must exercise supervision of a salesperson's other property management duties when the salesperson holds no independent property manager license. A broker has no responsibility to supervise the property management activities of salespersons who also hold independent property manager licenses. Further, a person who holds a license from the Board of Realty Regulation may be required to follow the Board's laws & rules even if the licensee is engaged in personal property transactions. Failure to comply with such laws and rules may present reasonable cause for the Board to discipline the licensee even for activity involving the licensee's own property.

ANALYSIS

Must a supervising broker exercise supervision of a salesperson's property management duties when the salesperson holds both a sales license and a property management license?

It appears beyond question that, if a salesperson is relying solely on his or her salesperson license in order to perform property management functions for others, the supervising broker bears supervisory responsibilities. MCA 37-51-102(25) provides that a "Supervising broker" means a licensed broker with whom a licensed salesperson is associated, directly, indirectly, regularly, or occasionally, to sell, purchase, or negotiate for the sale, purchase, exchange, or renting of real estate".

Because the definition of supervising broker uses the word 'renting', it might be argued that the supervising broker bears supervisory responsibility in all instances where the supervised salesperson is managing property - even when the salesperson is independently licensed as a property manager. However, I think that is the weaker argument.

It seems likely - and reasonable - that supervisory responsibility over renting activity was intended to be limited to persons who are performing it only under the auspices of their salesperson license. Salespersons who do not hold a property management license would necessarily be performing any property management activity only under the authority of their salesperson license. A supervising broker is required to supervise salespersons under their charge. Therefore, I believe the supervising broker has supervisory responsibility over these licensed salespersons (who have no independent property manager license). However, it is my opinion that the broker has no supervisory responsibility over salespersons who have taken the trouble to get their own independent property manager license.

This opinion should not be construed to mean that the broker is ever responsible for the personal real estate transactions of a salesperson regardless of whether the salesperson has a property manager license or not. MCA 37-51-309 provides:

(4)(a) The provisions of this chapter do not prohibit a salesperson from engaging in personal transactions, and the provisions of this chapter do not require a broker to exercise any supervision or provide any training for a salesperson with respect to personal transactions of the salesperson.

(b) A broker is not responsible or liable for the personal transactions of a salesperson.

(c) Prior to entering into a personal transaction, a salesperson shall disclose in writing to the other party that the transaction is a personal transaction with respect to the salesperson and that the transaction does not involve the salesperson's broker or real estate firm.

(5) For the purposes of this part, "personal transaction" includes the following:

(a) the sale, purchase, or exchange of real property owned or acquired by the salesperson; and

(b) the leasing or renting of real property owned by the salesperson.

Based on the above, the salesperson [who wishes to engage in a personal real estate transaction] is required to issue a writing making it very clear that the transaction is a personal transaction and the salesperson's broker and brokerage have nothing to do with the salesperson's personal real estate activity.¹ Notably, the statute only imposes a duty on the salesperson - not the broker. Failure to follow the disclosure requirements may result in discipline for the salesperson. Additionally, a licensee - whether a salesperson or broker - may run afoul of the board if either misleads anyone into falsely believing that the salesperson is performing under the supervision of the broker when, in fact, the transaction is unsupervised. Inquiry into these matters would necessarily require a facts and circumstances analysis on a case-by-case basis.

2) Does a licensee have to follow Board law & rules if they are managing their own property.....and, if they do, can the Board discipline the licensee for activity involving their own property?

The laws pertaining to salespersons and brokers are found in Title 37, Chapter 51, parts 1 through 5 whereas property management statutes are found in part 6. However, it will be noted that 37-51-103 provides exemptions for this chapter - which includes property managers. One of those exemptions is for property owned by the person performing the acts. If the exemptions do also apply to property managers, it could be argued that the chapter does not apply to property managers who own the property themselves.

However, many activities which are unrelated to real estate transactions, and which are not specifically found in the Real Estate Act, are still relevant to the Board's licensees. In fact, the Model Act applicable to all professional licensees lists many acts of unprofessional conduct which fall outside of the scope of the practice of real estate, yet still subject a real estate licensee to disciplinary action. MCA 37-1-316. There can be no question that a licensee could be disciplined under §316 even for activity related to a personal transaction. If that is so, there is all the more reason to allow discipline under the provisions of the Real Estate Act even when related to personal transactions.

¹ Here an inconsistency in the law becomes apparent. It appears that a person who holds only a salesperson license must issue the disclosure writing when engaging in a personal real estate transaction - whether it be a sale, purchase, or property management. However, nothing requires the person holding only a property manager license to issue a disclosure writing that the property manager is engaging in a personal transaction. Certainly a broker may be disciplined for being an agent and an undisclosed principal in the same transaction [MCA § 37-51-321(1)(g)], but there is no corresponding restriction for a property manager.

Moreover, the phrase 'The provisions of this chapter do not apply', which is found in the exemption statute, must not be taken out of context. The text of MCA 37-51-103 reads in pertinent part: "An act performed for compensation of any kind in the buying, selling, exchanging, leasing, or renting of real estate or in negotiating a real estate transaction for others, except as specified in this section, must identify the person performing any of the acts as a real estate broker or a real estate salesperson." In short, the statute is saying that if a person is going to practice real estate, [s]he must be licensed. While still on the topic of licensing, the statute goes on to list a number of circumstances in which the Act does 'not apply' - one of which is the owner exemption. The placement of the exemptions in the portion of the statute dealing with licensing indicates that the exemptions only apply to the licensing provisions of the Act. In other words, an owner is exempted from being licensed, not from behaving ethically. It is not the Act *in toto* which does not apply.² Once this is understood, it is clear that the statute - properly interpreted - provides that a person does not have to have a license to buy or sell his own property, but it does not forbid regulation of a person who already has a license.

As additional proof that the exemptions only apply to licensing and not the entire Act, it should be pointed out that the legislature has actually provided some other exceptions and obligations for a salesperson who is engaging in personal real estate transactions. MCA 37-51-321(1)(r) and MCA 37-51-309(4)³. Why include § 321(1)(r) or §309(4) in the chapter at all if the legislature had already provided that all licensee personal transactions be exempt from the chapter? In other words, why include personal transactions of licensees in the exemptions and then exempt them again later in the chapter? The obvious answer is that personal licensee transactions were not excluded from regulation by the exemption statute. In fact, the only reason to exempt personal transactions in §§309 and 321 is because they had not yet been exempted under the exemptions statute. It makes much more sense to interpret § 37-51-103 to mean that 'the licensing provisions' don't apply in the instance of personal transactions. In that case, the existence of limited personal transaction exemptions in §§309 and 321 make sense and all other regulation of licensees remains in place - even for a licensee's personal real estate transactions.

Caselaw has also addressed the issue of whether real estate licensees are exempted when selling their personal real estate. At least one Montana Supreme Court case determined that public policy prevents a real estate licensee from escaping statutory obligations merely by taking the property into his or her own name. Twite v. Western Sur. Co. (1978), 176 Mont. 286, 577 P.2d 1219. As argued above, the court assumed that the exemptions statute only applied to the requirement to get a real estate license. *Id at 287 & 289*. In fact, the court said that an other

² There are a number of exemptions listed in the statute. This memo only concerns one - the exemption relating to persons who are owners of the real estate in question.

³. MCA 37-51-321(1)(r) provides that a licensee is not obligated to place personal transaction money in the broker's trust account. Likewise, MCA 37-51-309 (4) authorizes a salesperson to do personal transactions, relieves a broker of supervisory responsibility over the salesperson's personal transactions, and requires the salesperson to make disclosures.

interpretation would be a 'misapplication of the Real Estate Licensing Act'. *Twite at 288*. The court simply did not think that the licensing exemption relieved a person who was licensed from acting ethically. The court said,

"There is no provision in the Act that relaxes the ethical standards for a licensee who happens to be selling property titled or contracted to the licensee." *Id at 289*.

In finding that real estate licensees fall under the ethical guidelines of the Act even when they are selling their own property, the court said,

"The fact that a person can sell his own property without being in violation of the Real Estate Act, for failure to purchase a real estate license, does not lend itself to the proposition that a licensed real estate salesman is relieved of his responsibility under section 66-1937, merely because he has taken property into his name before defrauding a purchaser. This would render the Act a nullity. Furthermore, it will stand without discussion that this kind of arrangement would be strictly against public policy, which is to protect the public from unscrupulous and insolvent real estate agents and brokers." *Id at 289*.

A case from the New Hampshire Supreme Court also provides guidance. In finding that a real estate licensee does not enjoy exemption from the real estate act when engaged in personal transactions, the trial court found that the plain meaning of the Act provides that "real estate agents and brokers are held to a standard of conduct, regardless of whether or not it directly affects a particular real estate transaction.". The supreme court agreed saying that the exemptions "[do] not exempt a licensed real estate broker simply because he participates in a transaction that does not require a person to hold a broker license." *Dupont v. New Hampshire Real Estate Commission, 2008 N.H. LEXIS 105, (2008)*.

I conclude that the exemptions in §103 only apply to the requirement to be licensed - not to the entirety of the chapter.

Given the foregoing, I believe that a real estate licensee must still act ethically even when doing personal transactions. Further, nothing in any of the law or court decisions indicates that the obligation to act ethically is limited to salespersons. Therefore, I also believe that the ethical obligation applies to salespersons, brokers, and property managers.

A new question then arises: Does acting ethically extend to the detailed requirements expected of other licensees (such as the various trust account requirements for property managers)? Taking the affirmative tack, it may be argued that the trust account requirements set forth in Rule are a factor in ethical behavior and also serve the public policy, which is to protect the public from unscrupulous and insolvent licensees. The trust account rules were put in place to lessen the likelihood of purposeful or irresponsible conduct which might lead to a consumer's financial

injury.⁴ If the trust account rules are not applicable, then the Board would have to wait for the licensee to actually injure someone financially before disciplining the licensee. That can not be said to be protective of the public. Nevertheless, I have already concluded that the exemptions only apply to the requirement to be licensed. It does not exempt a licensee from regulation under the balance of the chapter. This leads to the further conclusion that a licensee must abide by all Board laws and rules even when conducting personal transactions except for those limited instances where the legislature has specifically carved out separate responsibilities such as those in §§37-51-309 and 321.⁵

I conclude that, while the Board can never require someone to obtain a license in order to transact personal real estate business, the Board can and must demand that a licensee adhere to Board laws and rules when the licensee is transacting personal real estate business. In other words: a person does not have to have a real estate license to sell personal real estate but, if the person does have a real estate license, [s]he will be required to act ethically as set forth in the Realty Regulation Act.

Since I have demonstrated that a licensee conducting personal transactions is required to act ethically - and follow Board laws and rules - it follows that the Board can discipline a licensee for unethical behavior involving the personal transactions of the licensee.

Being forbidden to discipline a licensee for conduct engaged in during a personal real estate transaction would lead to inconsistent results. Example: Assume an unlicensed person cheats the person who is renting personal real estate from the unlicensed person. The unlicensed 'landlord' then applies for a property manager license. If the Board becomes aware of the cheating behavior, the Board would be justified in denying/restricting the license under MCA 37-51-603 which requires that a property manager applicant be "of good repute and competent to transact the business of a property manager in a manner that safeguards the welfare and safety of the public". Would it be consistent to punish that applicant but do nothing at all to a licensee who has done exactly the same thing? Clearly, the Board may discipline a licensee for misconduct during a personal transaction.

⁴. A similar argument applies to statutes and rules dealing with conduct other than trust account requirements.

⁵ The matter is complicated when one considers that a licensee may co-own real estate with a non-licensee. Can or should a licensee be required to comply with all of the Board's rules when the co-owner has no such responsibility? There does not appear to be a clear answer. I am reluctant to say that the licensee must be forced to choose between being disciplined, selling his share of the property or forcing his co-owner to comply with Board rules. The Board may want to review its rules with these thoughts in mind.

Conclusion: A supervising broker has no duty to supervise a salesperson's personal real estate transactions. A supervising broker must exercise supervision of a salesperson's property management duties when the salesperson holds no independent property manager license. A broker has no supervisory responsibility over the property management activities of salespersons who hold their own independent property manager license. Further, any person who holds a license from the Board of Realty Regulation must follow the Board's laws & rules when engaged in personal property transactions. Failure to comply with such laws and rules may present reasonable cause for the Board to discipline the licensee even for activity involving the licensee's own property.

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